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Religious Citizens: On the Relation between Freedom of Religion and the Separation of Church and State

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Introduction

Libraries can be filled with publications about the freedom of religion as one of the most ancient and best known human rights. Given the usage of the word 'religion' in the international legal texts, I will not distinguish between religion in the sense of being a member of a religious group and religion in the sense of belief. From my article, it will emerge that religion can be defined as a conviction about a transcendental truth that can be shared with others. Membership then is the expression, belief the foundation of religion.

In the history of the Netherlands, the struggle for freedom of religion was the starting point of the revolution against the Habsburg ruler. In the eyes of many, freedom of religion is the original point of reference for the constitutional identity of the Netherlands. According to Andeweg and Irwin (2009, 6), "religion and politics became enmeshed as the struggle for religious freedom became intertwined with the fight to protect traditional political freedoms".

Whereas churches and other religious institutions usually claim freedom of worship, teaching and internal organization vis-à-vis the state, they do not as easily accept freedom of legitimate action in politics. The concept of religious institutions is used throughout the chapter in a wide sense, including Jewish, Muslim associations, irrespective of the extent to which they have a structured organization and membership. Confessional political movements require their representatives to implement the moral convictions of their religious community and to follow the instructions of its leadership (mainstream Christian- democratic political parties are not "confessional" parties; Hirsch Ballin, 2013). This gives rise to tensions with the secular character of a polity. According to Leigh and Ahdar (2012, 1069), "[a] key mark of a secular state is the attempt to justify public policies and programmes on secular and not religious grounds".

No doubt, religion has a moral significance for the believer that is in principle relevant for all his actions, including political action as a citizen. In that sense, it also has a legitimate place in a secular democracy. That, however, does not give the believer the right to subjugate others to religious prescripts via the force of a political institution. It is everyone's responsibility as a

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co-citizen to live up to constitutional standards of decision-making that are mutually acceptable. As long as the outcome of the political process is compatible with human rights standards, the religious citizen has to abide by the rules. Freedom of conscience is with equal respect one of the characteristics of secularism (Maclure & Taylor, 2011). A rejection of a rule out of one's own conscience should under certain conditions be respected by the state, but this does not suspend the binding character of the rule itself.

In the footsteps of St. Augustine's text on the two cities – the earthly and the heavenly (Augustine, 426, Ch. 28) – we could say that man is a sort of double citizen: a citizen of his secular community, and one who is aspiring for the City of God. In his introduction to Marcus Dods' translation, Thomas Merton (2000, xx) takes a view on the relation between the two cities that whoever is concerned about the shortcomings of earthly cities may take to heart: “Nevertheless, the fact that the two cities are opposed to one another does not mean that they cannot peacefully co-exist here on earth. It is not impossible that they should agree upon a *modus vivendi*. They can come to terms, and it is well that they should do so. The temporal advantage of worldly society is well served when the citizens of heaven still living in the world are protected by the temporal power. And although the Church as a whole can only profit by persecution, nevertheless temporal peace is a greater blessing, and one to be prayed and worked for, since it provides the normal condition under which most men can safely expect to work out their eternal destiny”.

Beyond the Separation of Church and State

The ‘separation of church and state’ is a valuable template for the avoidance of conflicts between religious and secular obligations. Its meaning is that the state should neither meddle in the internal affairs of the church, nor the church(es) of that state. It is regarded as a precondition for the freedom of religion because it protects the independence of the churches and other religious institutions. At the same time, it asserts the democratic nature of the constitution, free from privileged influences. In the realities of our time, we might need a few more of these principles, e.g. a ‘separation of state and industry’. For example, why do we think that it is inappropriate for a bishop to be member of the Senate, but accept a chairperson of an employers' organization sitting on the Senate floor? In the United Kingdom a different situation exists, where bishops of the Church of England are by law members of the Upper House.

The origins of the separation principle are very clear though. The separation between church and state protects the freedom of religion from an institutional perspective. One of its purposes is to assure equal religious freedom. The state and the religious institutions refrain from attempts to control each other's internal affairs, and, as a consequence of its secular identity, the state will not privilege or disenfranchise anyone because of his or her religion.

We will first discuss its merits and implications, and then turn to the reasons why, in these times, a more sophisticated understanding of the relationship between religious and secular obligations is required.

Many European countries had an official church. Some of them still have, but with limited practical significance. The influence could go both ways, e.g. state approval for the nomination of bishops or ecclesiastical competence in certain areas of legislation. Into the 19th century, the Pope and some German bishops had their own states. Historically, the separation principle served equal treatment of all citizens and the full realization of democratic governance. The first step on the road towards acceptance of religious pluralism was the 'recognition' of other religious institutions, sometimes next to the (formerly) official church. Several European democracies had (like the Netherlands until the last quarter of the 20th century) or have (like Hungary) such a system of registration, respectively, recognition. The Hungarian system was abused when Parliament excluded nine formerly recognized churches (*Egyház and Others v. Hungary*, 2014). Other states, like France, view the absence of any official relation as the consequence of a strictly secular model.

Across all these differences most of the systems have one thing in common: religious freedom was viewed in the first place as the liberty to choose the religious community of their own preference (Sharma, 2011). The phenomenon of official churches and its opposite, the separation of church and state, reflected a situation where being religious was synonymous to belonging to a group, i.e. being a member of a specific church or other religious institution. Equal treatment irrespective of one's religion (or even not having a religion) and equal religious freedom are ensured by the constitution of democratic states and various international legal documents, including the Universal Declaration of Human Rights (UDHR) (Article 18), the International Covenant on Civil and Political Rights (ICCPR) (Article 18 with CCPR General Comment No.22:Article 18, Freedom of Thought (1993)), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 9) and the Charter of Fundamental Rights of the Europeans Union (Article 10). Article 18 ICCPR reads as follows:

- “1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

In these modern texts, the emphasis has shifted from the protected position of churches to an individual right. According to General Comment No. 22 on Article 18 ICCPR (1993, para. 4, last sentence), the protection of the churches and other religious institutions can be derived from this human right: “In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications”.

The relation between a church or other religious institution and its individual members is presupposed in this approach, but it is not the subject of any regulation. This can be regarded as a consequence of the religious freedom of the religious institutions: their inner organization is not regulated by civil law, but by their inner (e.g. ecclesiastical) regulations (cf. Art. 2:2 Dutch Civil Code; Warendorf et al., 2009).

Rituals, especially initiation rites and rites of transition at important life events, play an important role here (Hirsch Ballin, 2012). According to Bryan Turner (2011), “the core meaning of the Abrahamic religions was established by the Old Testament prophets and by the early Christian community to signify a body of people drawn together by belief in a monotheistic God and held together by rituals, especially dietary practices and sacrifice”. They confirm the inclusive relation between the religious community and the individual. The religious community offers him or her protection and the solidarity of the group in situations of need. In the absence of alternatives like state welfare, members of religious communities may feel pressure to comply with the rules and rituals of their group, even to the extent that their religious freedom is impaired. The state will in principle abstain from any interference.

Such pressures have faded away in most western democracies, but still exist or became even more severe in less developed societies. The success of the Muslim Brotherhood in North Africa and beyond, and of evangelical sects in Latin America derives at least partly from their ability to provide welfare and education to the downtrodden. The specific history of a country can also play a role. The Republic of Turkey views itself as having a ‘laic’ constitution; until recently a strictly secular constitutional identity prevailed in politics. Because of its past and of fears that Islamic clergy could take over, part of its constitutional setup involved – ever since the abolition in 1924 of the Caliphate – the exclusion of competing religious authorities from indirect power, through the establishment of an agency in charge of Sunni Muslim institutionalized religion, the Diyanet İşleri Başkanlığı (Somer, 2012). Article 136 of the Turkish Constitution provides for this body: “The Presidency of Religious Affairs, which is within the general administration, shall exercise its duties prescribed in its particular law, in accordance with the principles of secularism, removed from all political views and ideas, and aiming at national solidarity and integrity”.

We may conclude that the separation of church and state is an important, but not in itself sufficient protection of personal freedom in the domain of religion. The actual realization of freedom of religion requires the availability to the individual of alternative possibilities to maintain his or her social and economic subsistence in the unfolding of his or her life project. When, in 1917, the Dutch constitution integrated religiously-instituted schools in the state-sponsored educational system, it also introduced a constitutional guarantee that in every community public education as a neutral alternative would be available (Art. 23 of the Constitution for the Kingdom of the Netherlands).

A strict separation of state and church would leave these matters to be decided within the community, given everyone's right to determine at what point he or she will prefer to leave this community. But is that really sufficient as a guarantee for personal freedom? Freedom of religion depends not only on the *absence* of powers that interfere in their religious life, but also in the *presence* of institutions that protect them from undesired inclusion.

Severing the bonds with a community may put oneself in social isolation. This is often the case when essential social services like education and welfare depend on religious institutions. The constitutional identity of the state as an Islamic state or, until recently, a Christian state may serve as the justification for such practices, but *de facto* dominance of a certain religion can amount to similar results. Being excluded from the religious community may amount to someone's civil death; even worse are situations where leaders or tribunals of the religious community may impose physical punishment or the death penalty in cases of apostasy (BBC, 2014; Law Library of Congress Global Legal Research Center, 2014). Such an abhorrent breach of human rights is not justified by Islam either. According to Abdullahi Ahmed An-Na'im (2008, 122): "there should be no penal or other negative legal consequences for apostasy and all of the related concepts from an Islamic perspective, because belief in Islam presupposes and requires the freedom of choice and can never be valid under coercion or intimidation".

Such situations compromise religious freedom and contrast with the actual self-understanding of the person as a subject free to choose and to relate with other persons. The availability of support when needed from neutral or freely chosen service providers (including hospitals and schools) is a necessary precondition for the freedom to leave or stay outside a religious community. From the viewpoint of a religion true to its transcendent vocation, insincerity is equally undesirable. In the West, a prejudice exists that Islam does not care about forced 'conversions', pointing at the dire practices of Taliban, Al-Shabaab, Boko Haram and the so-called Islamic State. Some remember that history of Christianity was not honorific either: after the *Reconquista* of Andalucia (Al-Andalus), Muslims and Jews were forced to 'convert' to Christianity or face punishment and expulsion. For the Christian churches, this is something of a painful past. Authoritative Muslim leadership equally confirms that conversion can never be imposed by force (Open Letter to Dr. Ibrahim Awwad Al-Badri, 2014). An-Na'im (2008, 1, 125-128) even goes one step further: he demonstrates that in Islam itself a preference can be found for the secular state as the best context for a truly free life in faith ("[i]n order to be a Muslim by conviction and free choice") and underlines the significance of equal citizenship.

The freedom to change one's religion, guaranteed in the ICCPR and other international documents, appears to be a freedom to adhere to a different pre-existing religious institution. A growing number of people in modern society do not wholesale accept the teachings and precepts of a religious institution anymore (Joas, 2012). To them, religious freedom is also the personal freedom towards the shared points of reference (like revelations, prophecies, holy texts and holy places) to which they relate their religious identity. In other words: religious identity is not necessarily submission, but part of one's autonomy. This is what Russell Sandberg (2014, 223) has called the "subjective turn" in our understanding of freedom of religion.

Freedom of Religion in a Comprehensive Human Rights Context

The preceding paragraph has shown that the interpretation of freedom of religion as the freedom to accept or change a religion will not suffice in the face of social and economic pressures to join or not to leave a certain community. The confirmation of "the freedom to change one's religion" in the treaty provisions is insufficient. A full realization of personal freedom of religion depends on the overall freedom of the person. It is part of someone's human security, in the broad sense that people have "the right to live in freedom and dignity,

free from poverty and despair with an equal opportunity to enjoy all their rights and fully develop their human potential” (UNGA Res 66/290, 2010).

This transformation of the freedom of religion reflects a transformation of the role of religion in society. Against the common belief that secularization has gradually diminished the role of religion and that religion is fading away in modern societies, Hans Joas (2012, 42, 152) argues that secularization and the encounter in modern urbanized societies with a multiplicity of religions, have *transformed* the social meaning of religion. Religion is no longer a 'given' frame of reference for a more or less united group of believers, but rather an option that has to coexist with other religious options. This diversity might nevertheless build a united front against nationalist and racist enemies of universalism (Joas, 2012, 224-225).

Doug Saunders (2012, 153) arrives at a similar conclusion in his recent book about 'The Myth of the Muslim Tide'. Even where in the Arab World confessional movements like the Muslim Brotherhood have gained much influence, their leadership is actually not a restoration of former religious bonds, but rather “a politically conservative movement among a range of political choices”. Salafists and other fundamentalists fill a gap, in Germany and other European countries, created by feelings of exclusion among youngsters, deepening instead of healing the rifts in the society (Abdel-Samad, 2014, 102). The deciding point is not the call to violence, but their view on man and society. They are playing the identity card, inciting people to identify themselves in an exclusive manner with a specific ethnicity or religion (Abdel-Samad, 2014, 105). This is especially dangerous whenever the self-confident affirmation of this identity goes hand in hand with contempt against other identities (Sen, 2006; Maalouf, 1998). Abuses of religious identities are the most dangerous of all, since they can pit their followers against each other in 'holy wars', which are often even more ferocious than other wars because of the expectancy of a post-mortal reward for fallen fighters (on religious wars, cf. Armstrong, 2014). In this exploitation of religious feelings, both international legal norms and religious pre-scripts are trampled on, as we learn from the accurate analysis of both international law and Sunni Muslim legal and religious doctrine by M. Cherif Bassiouni (2014), (Joas, 2012, 182).

Just like any other legal concept the freedom of religion is in a continuing process of "iterations" (Benhabib, 2006, 48) to be re-interpreted and redefined. Religious freedom is thus going through new iterations from the freedom to be included in a ritually conformed community (in which religious authorities define their own powers) into a freedom to choose and articulate one's religion. Viewing freedom of religion as a right of the person is in the light of the changed socio-economic realities essentially more than the affirmation of an abstract, individual right. The neutrality of the state in its arbitrating and supporting functions is indispensable. Some of the traditional tenets of the separation of church and state have therefore to be reconsidered. This is the case with legalistic roofing over religious practices. Religious courts – churches as well as Islamic communities have them – may serve an equitable response to life questions, but must not display a compelling parallel structure that keeps people away from invoking their rights in a state court. The attempts to widen the reach of the hybrid religious *Körperschaften des öffentlichen Rechts* (religious bodies that under a transitional provision in Article 140 of the German Constitution can be established under public law (Epping, 2012, 140-141)) would further diminish the – still incomplete – separation of state and church in Germany and bolster conservative voices (Abdel-Samad, 2014, 111, 114). The persons appointed by their religious institution as a judge must therefore view their task as a specific pastoral service, bringing peace in conflict situations, not as religious law enforcement. Safeguarding the freedom of religion and conscience requires some state

supervision: everyone should feel free to accept or not to accept the jurisdiction of the judges of their religious institution.

Religious Citizenship

Meanwhile, many religious institutions struggle with the extent to which they should accept an increasingly self-defining adherence to their religion, and to what extent belonging to the community can be a process of mutual understanding instead of mere submission. It is basically the same process that changed political life in the course of the 19th and the 20th centuries. Authoritarian regimes have gone through the same process in many states during the 19th and 20th century: emancipation of the downtrodden and recognition of everyone's innate human dignity (Joas, 2011/2013) cannot be stopped. Freedom of religion requires therefore not only an institutional separation, but also a public structure that warrants equal rights in the other dimensions of living together. It is a dimension – condition and consequence at the same time – of the full enjoyment of human rights and citizens' rights (Hirsch Ballin, 2014). As a person whose dignity is protected by the law, the citizen has the right to be a religious person in the context that he or she accepts and creates, and maybe redefines over time (Thierse, 2000). Freedom is more than a bundle of rights: it is the power of every person to develop his or her life project in a society.

The context of life projects, protected and supported by human rights, in our times is a world 'on the move': ongoing migration to the cities brings people together from different origins, with different convictions. Under the 21st century conditions of migration and urbanization, people move around and co-create their changing social fabric. Many of the oppressed people and - consequently - of the refugees all over the world have suffered from a lack of protection (or even acceptance) of their citizenship on religious grounds, or pretended religious grounds as a guise for power hunger. Room for religious diversity is for them a natural requirement of living together.

Interesting here is the Canadian example. Bruce Ryder (2008, 87) claims in his chapter on 'The Canadian Conception of Equal Religious Citizenship' that "in a number of important ways, Canada takes a more robust approach to equal religious citizenship than can be found in the human rights jurisprudence of many other countries". Commenting a landmark case in the Canadian Supreme Court (*O'Malley v Simpsons-Sears*, 1985), Ryder (2008, 90) comes to the conclusion that "[w]ithout the ability to demand that neutral rules and policies be adjusted to meet their religious needs, people of faith cannot participate equally in social and economic life". At the same time, however, it is recognized "that religious equality rights are not absolute; they will have to give way in the face of competing rights and interests".

What is needed in contemporary society is a mutual willingness of political actors and religious leaders to engage in a dialogue, respectful of each other's responsibilities, aiming at an understanding of how religious freedom and democratic legitimacy can be brought to terms. In Catholicism, the authoritative 'Compendium of the Social Doctrine of the Church' recommends a "method of discernment", "structured around certain key elements" including analysis "with the help of social sciences", reflection "in the light of the Gospel and the Church's social teaching", and "identification of choices" (Pontifical Council for Justice and Peace, 2005, para. 568; Hirsch Ballin, 2013).

Religion is a contribution to a vital civil society. It should not be a tranquillizer (as it often has been, in the service of the ruling class). Because it expresses itself in moral categories, it is a more productive source of unrest than the superficial bashing of the elite by 'social' media. The role of the citizen is pivotal in a free society that has organized itself as a democratic state on the basis of the rule of law (Hirsch Ballin, 2014, 141). Religion is, at least in the self-understanding of the believer, fundamental to his or her personal identity. A religious person (who may be a believer or a non-believer) rejects any self-deification. Religion, in this encompassing meaning, doesn't replace the 'political' nature of man that makes him a citizen. Rather, it is an unassuming way to strive for perfection in the service of others.

Conclusion

Respecting the role of religion in a free, democratic constitutional context is not self-contradictory. In the view of Jürgen Habermas (2006, 9-10), a post-secular society must include religious voices: "all that is required here is the epistemic ability to consider one's own faith reflexively from the outside and to relate it to secular views. Religious citizens can well recognize this 'institutional translation proviso' without having to split their identity into a public and a private part the moment they participate in public discourses". Secularist ideologies have given way to a secular state that appears to be compatible with an acceptance of freedom in faith. This was also the starting point for the Muslim scholar An-Na'im. Present day tensions around all varieties of fundamentalism underline the importance of such a different approach. Even in France, the country from which the idea of a strictly secular state originates and where the principle of *laïcité* is firmly rooted in constitutional theory, new approaches emphasizing the value of a free dialogue have emerged since the late 20th century (Gauchet, 1998).

Only a humane religion, i.e. a religion that accepts the *condition humaine* of diverse human beings living together, is what we can have in mind when we recognize freedom of religion as a human right. Specific "public theologies" might justify a view on citizenship that excludes followers of other beliefs. See the article by Sandal (2013) for an analysis of the impact of "public theology" on shortcomings in equal citizenship in Turkey. Does this mean that the freedom of religion can only protect some religions, not all, irrespective of their tenets? Peter Danchin (2006, 415) has – in the view developed here, rightly – criticized international law scholars for their acceptance of a problematic view on religion: "Human rights law (...) has deferred to religious despotism in the private sphere through the definition of religion as a 'sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected'."

Our answer to this delicate question must be precise. Indeed, not every ideology that claims to be a religion deserves protection. I reject the idea of such an 'absolute' freedom of religion. Think for instance of the tenets of the so-called Islamic State, an example which might be supplemented by many other religions in all parts of the world. An 'absolute' interpretation of the freedom of religion would run as follows. The so-called caliph (assuming this title without wide consensus among Muslims was actually an act of heresy according to the Open Letter to Dr. Ibrahim Awwad Al-Badri, 2014, para. 22) would have the right to teach that mankind should live in a political system in which every deviation from the teachings he endorses is to be subject to severe punishment. He and his followers are however not entitled to put these teachings into practice because that would infringe upon the human rights of others, and the dissemination of these teachings would in many jurisdictions have to be

qualified as incitement to hatred and violence against others on the basis of group characteristics, i.e. a crime. What sense then would it make to call this a religion that is protected under human rights, if its very core is not acceptable under a human rights regime, which by its nature first and foremost protects the freedom to live together in peace and dignity?

This apparent aporia reveals to us what we actually have in mind when we talk about freedom of religion: not *any* claim about an absolute truth, but a view (set of convictions) on the transcendental dimension of humanity. According to Rafael Domingo (2013, 452), “all legal systems should be open to transcendence as a constitutive element of the legal approach to religious freedom”. Ideologies that promote violence at the expense of human dignity do not qualify for protection by human rights. In a commonwealth, where people live together under the reciprocal recognition of human rights – a democratic state under the rule of law – being religious does not diminish one's rights and obligations as a citizen, nor does citizenship diminish the possibility of hearing a religious vocation (Habermas, 2008, on the legitimate place of religion in a secular (but not a secularist) state). Hearing and listening is, according to Karl Rahner's (1971) Christian anthropology what defines man in his or her religious identity. Hearing the Word of God does not take man out of history and society.

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